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# RECORD, CASE NO. 14204.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 212.

EDWARD L. HEDDEN, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

WILLIAM ROBERTSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 3, 1890.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you between William Robertson, plaintiff, and Edward L. Hedden, defendant, a manifest error hath happened to the great damage of the said Edward L. Hedden as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the part aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and ninety, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 17th day of January, in the year of our Lord one thousand eight hundred and ninety.

JOHN A. SHIELDS,
*Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
*Southern district of New York, ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-seven, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Edward L. Hedden, plaintiff in error, against William Robertson, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 19th day of August, in the year of our Lord one thousand eight hundred and ninety, and of the independence of the United States the one hundred and fifteenth.

[SEAL.] JOHN A. SHIELDS,
*Clerk.*

(Indorsed:) 12382. U. S. Supreme Court. Edward L. Hedden, plaintiff in error, against William Robertson, defendant in error. Writ of error. Edward Mitchell, U. S. attorney, attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 17 day of Jan'y, 1890. Charles Curie, attorney for defendant in error.

3 Superior court of the city of New York.

*Summons No. 4.*

WILLIAM ROBERTSON, PLAINTIFF,
*against*
EDWARD L. HEDDEN, DEFENDANT.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, May 1st, 1888.

CHAS. CURIE,
*Plaintiff's Attorney, Office No. 44 Exchange Place, New York City.*

(Endorsed:) 12382. No. 4. N. Y. superior court. William Robertson, plaintiff, against Edward L. Hedden, defendant. Summons. Chas. Curie, plaintiff's attorney, 44 Exchange Place, New York City. Due service hereof admitted this 1st day of May, 1888.

4 N. Y. superior court.

*Notice of appearance and demand.*

WILLIAM ROBERTSON
*versus*
EDWARD L. HEDDEN. } No. 4.

You will please take notice that I am retained by and appear as attorney for the defendant in this action, and demand service of a bill of particulars of the plaintiff's claim herein and a copy of the complaint and all papers in this action upon me at my office, in the United States Court and Post-Office Building, in the city of New York.

Yours,

STEPHEN A. WALKER,
*United States Attorney, Attorney for Defendant.*

NEW YORK, *May* 15, 1888.

To CHARLES CURIE, Esq.,
*Attorney for Plaintiff.*

5 (Indorsed:) 12382. N. Y. superior court. William Robertson versus Edward L. Hedden. Notice of appearance. Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within notice is hereby admitted. Dated the day of , 189 . Rec. May 15, 1888. Plaintiff's attorney. To Charles Curie, esq., plaintiff's attorney.

6 The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against E. L. Hedden, defendant, by William Robertson, plaintiff's, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 24 day of May, 1888, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, the 16 day of May, in the year one thousand eight hundred and eighty-eight.

[L. S.] JOHN A. SHIELDS,
*Clerk.*
STEPHEN A. WALKER,
*United States Attorney, Attorney for Defendant.*

7 (Indorsed:) 12382. U. S. circuit court. William Robertson vs. E. L. Hedden. Copy certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, May 16, 1888. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To Charles Curie, esq., plaintiff's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, May , 1888. Rec. May 16, 1888. Plaintiff's attorney.

8 Circuit court of the United States for the southern district of New York.

*Complaint.*

WILLIAM ROBERTSON, PLAINTIFF,
*against*
EDWARD L. HEDDEN, DEFENDANT.

Plaintiff complains:

1st. That defendant was, during the time hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiff was, during said times, in trade, under the firm name of William Robertson, and, as such, duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintiff, as and for duties thereon, and plaintiff, in order to obtain said goods, was compelled to pay, and did pay, the sum of ten hundred and sixteen $\frac{34}{100}$ dollars in excess of the amount required by law.

4th. That plaintiff filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiff made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said enteries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals, when this action was commenced.

6th. That the bill of particulars, hereto annexed, states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum, so exacted, as aforesaid, has never been repaid to plaintiff, and is still due and owing to him.

Wherefore, plaintiff demands judgment against defendant for ten hundred and sixteen $\frac{34}{100}$ dollars, with interest on the several sums named in the bill of particulars, from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
*Attorney for Plaintiff.*

9 (Indorsed:) 12382. U. S. circuit court. William Robertson, plaintiff, against Edward L. Hedden, defendant. Complaint. Chas. Curie, plaintiff's attorney, 44 Exchange Place, New York City. Due service of a copy hereof admitted this 2nd day of June, 1888.

10 *Bill of particulars.*

[Name of importer, William Robertson.]

| | Description of goods. | Whence imported. | Name of vessel. | Date of invoice. | Date of entry at custom-house. | Amount of duty illegally exacted. | Date of payment of duties in excess. | Protest filed. | Date of appeal to Secretary of the Treasury. | Date of Secretary's decision. |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | 1886. | 1886. | | 1886. | 1886. | 1886. | |
| 1 | Manufactures of cotton, n. s. p. f | Glasgow | Furnessia | June 17 | June 29 | 3.82 | June 30 | Dec. 21 | Dec. 21 | Mch. 22, '88 |
| 2 | do | L'pool | Oregon | Feb. 6 | Feby. 17 | 38.32 | " 21 | " 21 | " 21 | " 22, " |
| | | | | | | | | 1887. | 1887. | |
| 3 | do | Glasgow | Devonia | July 14 | July 27 | 37.00 | July 27 | Jany. 13 | Jany. 13 | No ans. reed. |
| 4 | do | " | Ethiopia | Apl. — | May 3 | 97.31 | May 3 | " 22 | " 22 | Mch. 22, '88 |
| 5 | do | " | Devonia | May 5 | " 18 | 113.39 | " 18 | " 22 | " 22 | " 22, " |
| 6 | do | " | Circassia | July 29 | Aug. 10 | 40.89 | Aug. 10 | " 22 | " 22 | " 22, " |
| 7 | do | " | Ethiopia | Apl. 22 | May 3 | 64.01 | May 4 | " 26 | " 26 | " 22, " |
| 8 | do | " | Anchoria | Aug. 13 | Aug. 27 | 50.36 | Aug. 27 | Feby. 9 | Feby. 9 | No ans. reed. |
| 9 | do | " | Circassia | Mch. 11 | Mch. 23 | 106.75 | Mch. 24 | " 25 | " 25 | " " |
| 10 | do | " | Anchoria | Apl. 27 | May 15 | 46.55 | May 15 | " 25 | " 25 | " " |
| 11 | do | " | Devonia | May 6 | " 21 | 43.19 | " 21 | Mch. 12 | Mch. 12 | " " |
| 12 | do | " | Circassia | June 24 | July 7 | 45.80 | July 8 | " 19 | " 19 | " " |
| 13 | do | " | Devonia | Apl. 1 | Apl. 16 | 69.86 | Apl. 16 | " 24 | " 24 | Apl. 17, '88 |
| 14 | do | " | Circassia | May 20 | June 1 | 16.46 | June 2 | " 24 | " 24 | " 17, " |
| 15 | do | " | Ethiopia | Aug. 5 | Aug. 17 | 31.86 | Aug. 18 | Apl. 16 | Apl. 16 | No ans. reed. |
| 16 | do | " | S. of Nebraska | Feby. 19 | Mch. 5 | 132.72 | Mch. 5 | June 8 | June 8 | Mch. 22, '88 |
| 17 | do | " | Furnessia | May 13 | May 25 | 26.85 | May 26 | " 8 | " 8 | " 22, " |
| 18 | Manfs. of cotton & metal thread | " | Furnessia | " 13 | " 25 | 14.70 | " 26 | " 8 | " 8 | Feby. 21, " |
| 19 | Manfs. of cotton, n. s. p. f | " | Furnessia | " 13 | " 25 | 36.50 | Feby. 2, '88 | June 30, '86 | June 30, '86 | No ans. reed. |
| | | | | | | 1,016.34 | | | | |

11 (Indorsed:) 12382, U. S. circuit court, southern district of New York. William Robertson against Edward L. Hedden. Bill of particulars. New York, June 2, 1888. To Stephen A. Walker, esquire, defendant's attorney. Sir:—Please to take notice, that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars. Chas. Curie, plaintiff's attorney, 44 & 46 Exchange Place, New York City. Due service hereof admitted this 2nd day of June, 1888. Defendant's attorney.

12 Circuit court of the United States for the southern district of New York.

WILLIAM ROBERTSON ET AL.
*versus*
EDWARD L. HEDDEN, COLLECTOR, ETC. } N. S. 12382.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay to the defendant as collector or otherwise the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with the defendant any protest or protests as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of ascertainment and liquidation of duties thereon.

VII. And further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon; or within ninety days after payment of duties paid thereon after such decision.

VIII. And further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were demanded of the plaintiffs and were by the plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X. And further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were sums due from the plaintiffs to the United

States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

STEPHEN A. WALKER,
*United States Attorney, Attorney for the Defendant.*

13 (Indorsed:) 12,382. U. S. circuit court, southern district of New York. William Robertson et al. vs. Edward L. Hedden, collector, etc. Copy. Answer. Stephen A. Walker, United States attorney, attorney for defendant. Sir: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated New York, Dec. 14, 1888. Yours, &c., Stephen A. Walker, U. S. att'y & att'y for def't. To Charles Curie, esq., attorney for plaintiffs. Rec. Dec. 14, 1888.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Thursday, the 24th day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The honorable E. Henry Lacombe, circuit judge.

WILLIAM ROBERTSON
*vs.*
EDWARD L. HEDDEN. } No. 12382.

Now comes the plaintiff, by Stephen G. Clarke, esq., his attorney, and moves the trial of this action; likewise comes the defendant, by William Wickham Smith, esq., assistant United States attorney, his attorney; thereupon a jury is empaneled and the cause proceeds to trial.

Afterwards and on Friday, the 25th day of October, 1889, after hearing the evidence of the parties, and the argument of counsel, the court directs the jury to find a verdict for the plaintiff; whereupon the jury find a verdict for the plaintiff in the sum of nine hundred and eighty-three dollars and ninety-three cents ($983\frac{93}{100}$), and so they say all.

On motion of William Wickham Smith, esq., it is

15 Ordered, That the defendant have a stay of sixty days in which to make and serve a case with leave to turn the same into a bill of exceptions, and

On like motion the court grants the defendant a certificate of probable cause.

An extract from the minutes.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

16 U. S. circuit court, southern district of New York.

WILLIAM ROBERTSON }
*vs.* } Judgment. No. 12382.
EDWARD L. HEDDEN. }

The above cause having been brought on for trial before the honorable E. Henry Lacombe, judge of this court, and a jury duly empaneled to try the same, on the 25th day of October, 1889, and a verdict having thereafter been found by the jury; under the direction of the court, in favor of the plaintiff in the sum of nine hundred and eighty-three dollars and ninety-three cents ($983.93), and the costs herein having been taxed in the sum of forty-six dollars and eighty-five cents ($46.85); now, on motion of Charles Curie, esq., attorney for the plaintiff herein, it is adjudged that the plaintiff, William Robertson, have judgment against the defendant, Edward L. Hedden, in the sum of $983.93 damages, $13.28 interest, and $46.85 costs, making in all the sum of one thousand forty-four dollars and six cents ($1,044.06), and have execution therefor.

Dated New York, January 16th, 1890.

Judgment signed this 16th day of January, A. D. 1890.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

17 (Endorsed): 12382. U. S. circuit court, southern district of New York. William Robertson vs. Edward L. Hedden. Judgment roll. Charles Curie, plaintiff's attorney, 44 Exchange Place, N. Y. U. S. circuit court. Filed Jan. 16, 1890. John A. Shields, clerk.

18 United States circuit court, southern district of New York.

WILLIAM ROBERTSON }
*vs.* } N. S. 12382.
EDWARD L. HEDDEN. }

*Defendant's bill of exceptions.*

Afterwards, to wit, on the 24th day of October, 1889, at a stated term of this court, the issues in this action came on to be tried before the Honorable E. Henry Lacombe, circuit judge, and a jury duly empanelled to try the same.

Plaintiff appeared by Charles Curie, his attorney, and Stephen G. Clarke, esq., counsel; and the defendant by Edward Mitchell, esq., United States attorney, and W. Wickham Smith, esq., assistant U. S. attorney.

During the course of the trial counsel for the defendant took sundry exceptions to the rulings and directions of the court, and to its refusal to give certain instructions and directions to the jury as then and there prayed for by said counsel, which said exceptions are hereinafter severally set forth.

19 To maintain the issues on his part, plaintiff put in evidence sixteen entries of merchandise made at the port of New York, with the accompanying invoices and protests duly filed in each instance against the rate and amount of duty exacted by the collector.

From these papers it appears that the importations covered by the protests were classified by the collector as cotton cloth, and duties were

assessed upon them by him according to their number of threads per square inch and value per square yard under the countable clause of Schedule I of the tariff act of 1883 (paragraphs 319, 320, 321). The protests made by the plaintiff against the exaction of duty at this rate was in the following form:

NEW YORK, *Dec.* 21, 1886.

Hon. EDWARD L. HEDDEN,
*Collector of Customs, New York:*

SIR: We hereby protest against your decision and assessment of duties as made by you and the payment of more than 35% ad valorem on our importations below mentioned, consisting of certain Madras mulls or other open fabrics, plain, figured, or embroidered, and lappets for curtains or other manufactures, or made-up articles composed of cotton, claiming that under existing laws, and particularly by Schedule I, act March 3, 1883, said goods are liable at no more than 35% ad valorem as a manufacture of cotton not specially enumerated or provided for, and not at 4½c. per square yard and 40% or 5c. 40%, or as charged by you; and we
20 . give notice that we pay all other higher rates than is claimed above as the legal rate under compulsion and to obtain possession of our goods, and we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refund of the difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods, claiming that said duty is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty, and protesting against all illegal exactions of duty thereon, and hereby give notice that we intend this protest to apply to all future similar importations by us, and also intend the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, to be an appeal to him from your decision, and to likewise apply to all future similar importations by us. Pr. S. S. Oregon fr. Liverpool, Feby. 17/86, c. 22526, Dec. 13/86.

Pr. S. S. Furnessia fr. Glasgow, June 29/86, c. 88594, Dec. 15/86.
Devonia " " July 27, " " 41834, 10191, Dec. 13/86.

CHAS. CURIE,
*Attorney*, 44 *Exchange Place, N. Y.*
For WM. ROBERTSON.

21 Plaintiff also proved that he had duly appealed from the decision of the collector to the Secretary of the Treasury on each of the importations in question, and had in all other respects complied with the requirements of law to entitle them to sue.

Further, to maintain the issue on his part, plaintiff read in evidence the deposition of Nicol Paton Brown, taken de bene esse on October 8th, 1889, the substance of which was as follows:

My name is Nicol Paton Brown. I reside at 8 Doune Gardens, Scotland. I expect to return to Glasgow to-morrow. I am a member of the

firm of John Brown & Son. Their business is, plain and fancy muslin manufacturers, and is carried on at Barrowfield Weaving Factory, Bridgeton, Glasgow. We ship our manufactures to the United States to William Robertson, the plaintiff in this suit. I directed the making up, the packing, and the shipping of the goods that were consigned by our firm to Mr. Robertson during the year 1886, and made the declaration of their contents—the contents of the cases forming each shipment—before the United States consul in Glasgow or his delegates. I am able to state, by referring to the invoices, the goods contained in each case. I have examined the duplicate invoices of each shipment embraced in this suit, and I produce samples of the various goods described in the invoices. In some instances the samples produced by me are identical with the goods described in the invoices, and where this is not the case the samples I produce are
22 like those covered by the invoices in quality and manufacture, differing only in slight particulars from them in color or design.

The witness then produced 21 samples of goods corresponding to those described in the invoices, which samples were received in evidence, and marked Exhibits 1 to 21, inclusive. The witness continued his testimony as follows: The goods covered by the shipments in question, and of which I have produced samples, were manufactured by the firm of which I am a member—John Brown & Son. I have been manufacturing such goods ten years, and am thoroughly familiar with the process of manufacture.

Q. Please state in detail on what kind of looms or other machinery the goods, of which samples have been produced, are made, and give the process of manufacture until the goods are completed ready for shipment.

A. The goods of which sample have been produced should be divided into two. In the first the groundwork is plain weaving; in the second the groundwork is gauze weaving, but they are both alike in that they are woven in looms with two or more shuttle boxes on each side of the lathe and having above it a Jacquard machine, which is connected to the web in the loom by a specially prepared thread or yarn called the harness yarn, each one of which is attached to several threads, being less or more according to the scope of the pattern desired to be woven. When woven, the fabric on being taken from the looms is carried to a machine called a clipping machine the roll of the fabric is attached to a beam at the back of the machine by one end and wound on to it. The loose end is carried
23 up diagonally over an angle formed by two blades of steel with blunt edge, above which angle there is placed a roller having spiral blades with sharp edges; this roller is placed very close to the angle aforesaid, over which the cloth has been drawn, and fixed to another beam at the opposite side of the machine, and when properly adjusted the machine is started the roller revolves at great speed, the beam at one side gives off the cloth, which is taken up by the roller at the other side, and as the fabric passes over the angle referred to; being in close proximity to the revolving knives, the loose threads of the weft which have not been woven into the groundwork are cut off.

In order to render this more easy, two men sit in front of the fabric as it leaves the first beam and with brushes raise the loose weft threads so that they may be more easily removed by the spiral knives. Each piece of the fabric is passed through this clipping machine three times, in order

that the figuring or pattern may be brought out quite distinctly. The fabric is then ready to go through the ordinary process of finishing and warehousing, so as to be ready for sale. Samples 2, 5, 6, 14, 19, and 21 represent plain weaving in the groundwork; the others represent gauze weaving in the groundwork. After the weaving is complete the fabrics are taken from the loom and put through this clipping machine, as described. The object of the Jacquard attachment is to make the pattern upon the groundwork—that is, the figure. But these goods are all made of cotton, except in one case, that of sample No. 15, the figuring weft of which is silk. When the cloth is drawn off the beam it rests upon an angle formed by two longitudinal pieces of steel with blunt edges
24 set so as to form an acute angle or something less than a rectangle; and the fabric is drawn over the blunted points of the angle thus formed. Taking Ex. 2 as containing a simple figure for purposes of illustration, when this fabric is woven and taken from the loom the dotted figures of red now shown upon it are then present woven into the fabric, but red threads still remain connecting loosely each dot, horizontally across the fabric, but not longitudinally, and it is those threads which are removed by the clipping machine, and a similar state of facts exists as to all the more complicated figures in the other samples. The threads forming the figures in these fabrics are carried by different shuttles from those that carry the weft of the groundwork, or main body of the fabric, and as many different shuttles as there are colors in the figure. The number of threads to the square inch, counting warp and filling or weft, at differ at different parts of the fabric, and the threads of the filling are many of them not continuous across the fabric, having been cut after removal from the loom and portions of them removed. I used the term "muslin" in my testimony as applied in Scotland, and distinctly not as applied in this country. Goods like the samples here and the goods in controversy are used for curtains, for windows, for beds, for covering toilet tables and parlor tables, and for bed covers and for portièrres; these are the principal uses.

25 Cross-examination by defendant's counsel:

In the groundwork of the fabric as distinguished from the figure or pattern the number of threads to the square inch is uniform throughout the fabric, but when the fabric leaves the loom and before it goes into the clipping machine the count of the fabric as a whole differs from the count after it has been passed through the clipping machine. Before the fabric is put in the clipping machine the number of threads to the square inch in the groundwork of the fabric as distinguished from the colored threads which form the figure is uniform throughout the fabric, so that if in any of these fabrics a square inch is selected for the purpose of the count, in which there is no figure or part of a figure, the number of threads in that square inch will be the number of threads in any square inch of the groundwork of the fabric. The terms weft and filling are synonymous, and I have so used them in my testimony. The Jacquard machine gives the indication to the threads of the warp which forms the figure, but the loom is instrumental in leaving both the groundwork and the figure. It would not be right to say that the Jacquard machine had nothing to do with the groundwork, because as the loom is mounted it is essential in most cases to the production of the groundwork as well as

the figure; the function of the Jacquard attachment is to indicate and bring into use the particular threads that will enter into the weaving of the fabric at different stages of the progress of the weaving to produce the figure. The weft threads make the figure, but require to be woven
26 in by the warp in order to retain them in position in the fabric when being passed through the clipping machine after being woven. My firm manufactures goods of the character of Exhibit 2, which are plain and have no figure on them at all; they are not made upon the same machine as the goods represented by the samples here to-day; the machine is different in many ways, but the main difference lies in the fact that they have only one shuttle box at each side of the lathe and consequently can only weave fabrics of one shuttle. It would be possible to make plain goods on the same looms as these figured goods are made on, but the mountings would have to be changed, and it would be entirely unremunerative as the looms are larger, much heavier, and cannot be run with the same speed as single shuttle looms, or at the same expenditure of power. My firm does not manufacture Nottingham lace curtains, Hamburg nets or cotton lace, bedspreads, and tidies, but we sometimes purchase or contract to have them made for us outside of our mills, Nottingham lace curtains. I have seen the Nottingham lace machines several times in operation and have had it explained to me in such a manner as to enable me to say that I am familiar with it, although not practically. It is not similar in its character and operation to the machine upon which the goods in controversy were made, and is not a loom; the only feature that it has in common with the looms on which the goods in dispute are woven is the Jacquard machine, but even these machines differ in detail of construction, although the principle is the same, I believe.

27 Q. State whether the goods in controversy in this case have any resemblance or similitude in any respect except in the material of which they are composed to any of the following-named articles: cotton, cords, braids, gimps, galloon, webbing, groing, suspenders, or braces.

(Objected to by plaintiff's counsel as irrelevent and immmaterial; also that it is incompetent for the witness to testify as to his opinion of similarity or dissimilarity—that being a question to be determined upon the facts existing as to the goods sought to be compared.

The court sustained his objection, and excluded the question, to which ruling defendant's counsel then and there duly excepted, and the exception was duly noted and allowed.)

Further to maintain the issues on his part, plaintiff called as a witness Frederick W. Brooks, who, being duly sworn, testified as follows:

I am a liquidator in the custom-house; I have examined the entries and invoices which have been put in evidence, as to the goods in question here, and have made a computation of the difference between the amount paid and amount claimed by the plaintiff. I find the amount of the difference to be $819.07, and the interest thereon from the dates of the various exactions to the present time to be $164.86, making a total of $983.93.

Plaintiff then rested.

28 To maintain the issues on his part defendant called as a witness William H. Parkhill, who, being duly sworn, testified as follows: I am an examiner of cotton goods in the United States Public Stores, No. 402 Washington street in this city. I have held that position for over

three years and a half. It is a part of my duty in the examination of cotton goods, for the purpose of their classification under the tariff, to count the threads of countable cotton fabrics. I am considered an expert in that line. It has been my practice, in the course of my duties at the appraiser's stores, to count the threads in fabrics of that character of samples 1 to 21, inclusive, in suit. The practice at the appraiser's stores in counting the threads of fabrics of the character of samples 1 to 21 in suit is to count the warp and the filling by the use of a magnifying glass. The kind of glass that is usually used is a glass which covers a quarter of a square inch of the fabric, and having counted the number of threads in a quarter of a square inch of the groundwork, by means of this glass, we determine the number of threads to the square inch by multiplying by 4; this testimony will apply to all the samples 1 to 21 that are on the table before me; the number of threads between the limits of 100 and 200, as fixed in the cotton schedule, is stated on the various invoices; and the number of threads as thus stated has been in each instance determined in the way I have just described, by counting the number of threads in a quarter of a square inch in the groundwork and multiplying by
29 4, and no reference has been made to the threads that are in the figures.

It further appeared that there is no thread of the weft thread forming the figure that is continuous throughout the fabric, but there are warp threads continuous throughout the fabric which lock into the weft threads of the figure.

Defendant then rested.

Defendant then moved for direction of a verdict in his favor on the ground that nothing had been shown upon the part of the plaintiff to impeach the finding of the collector; that the goods involved in suit were cotton cloth of which the number of threads were countable, and were, therefore, properly dutiable under the countable clauses of this schedule under which the collector had assessed them, and there was no testimony tending to show that the count was incorrect or that the value was different from that adopted by the collector.

The court denied this motion and refused to direct a verdict as requested, to which ruling counsel for the defendant then and there duly excepted, and the exception was duly noted and allowed.

Counsel for plaintiff then moved for the direction of a verdict in favor of the plaintiff, which motion was granted by the court, and a verdict directed in favor of the plaintiff for the sum of $983.93, to which ruling and direction counsel for the defendant duly excepted then and there, and the exception was duly noted and allowed.

30 The jury rendered a verdict in accordance with the direction of the court.

And for as much as the matters, things, and exceptions aforesaid as would not otherwise appear by the record the judge before whom the cause was tried has settled, allowed, and signed this bill of exceptions as of the 24th day of October, 1889.

E. HENRY LACOMBE.

31 (Indorsed:) U. S., 12382. U. S. circuit court, southern district of New York. William Robertson versus Edward L. Hedden.

Defendant's bill of exceptions. Edward Mitchell, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, , 188 . , attorney for plaintiff. To , attorney for plaintiff. U. S. circuit court. Filed Jan. 15, 1890. John A. Shields, clerk.

32 Supreme Court of the United States.

*Assignment of errors.*

EDWARD L. HEDDEN, PLAINTIFF IN ERROR,
*vs.*
WILLIAM ROBERTSON, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court at the Capitol in Washington, come the said plaintiff in error by Edward Mitchell, U. S. att'y, (his) attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

EDWARD MITCHELL,
*U. S. Attorney, Attorney for Plaintiff in Error, P.*

33 (Indorsed:) 12382. United States Supreme Court. Edward L. Hedden, plaintiff in error, vs. William Robertson, defendant in error. Assignment of error. Edward Mitchell, U. S. attorney, attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this 17th day of Jan'y, 1890. Charles Curie, attorney for defendant in error. To , attorney for in error. E. & A. A. 892. U. S. circuit court. Filed Jan. 17, 1890. John A. Shields, clerk.

34 Supreme Court of the United States.

*Joinder in error.*

EDWARD L. HEDDEN, PLAINTIFF IN ERROR,
*vs.*
WILLIAM ROBERTSON, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Charles Curie, his attorney, comes into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

CHARLES CURIE,
*Attorney for Defendant in Error.*

35 (Indorsed:) 12382. United States Supreme Court. Edward L. Hedden, plaintiff in error, vs. William Robertson, defendant in error. Joinder in error. Charles Curie, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 18th day of January, 1890. Edward Mitchell, attorney for plaintiff in error, P. To Edward Mitchell, esq., attorney for plaintiff in error. E. & A. A, 892. U. S. circuit court. Filed Jan. 18, 1890. John A. Shields, clerk.

36 UNITED STATES OF AMERICA, *ss:*

To WILLIAM ROBERTSON, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Edward L. Hedden is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated Jan'y 17, 1890.

E. HENRY LACOMBE.

37 (Indorsed:) 12382. U. S. Supreme Court. Edward L. Hedden, plaintiff in error, against William Robertson, defendant in error. Citation. Edward Mitchell, U. S. attorney, attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 17 day of January, 1890. Charles Curie, attorney for defendant in error. E. & A. A. 892. U. S. circuit court. Filed Jan. 17, 1890. John A. Shields, clerk.

(Indorsed on cover:) No. 7212. Edward L. Hedden, collector of the port of New York, plaintiff in error, vs. William Robertson. S. New York. C. C. U. S. Filed October 3, 1890.

Office Supreme Court U. S.
FILED.
JAN 2 1894
JAMES H. McKENNEY,
CLERK.

CASE NO. 14204.

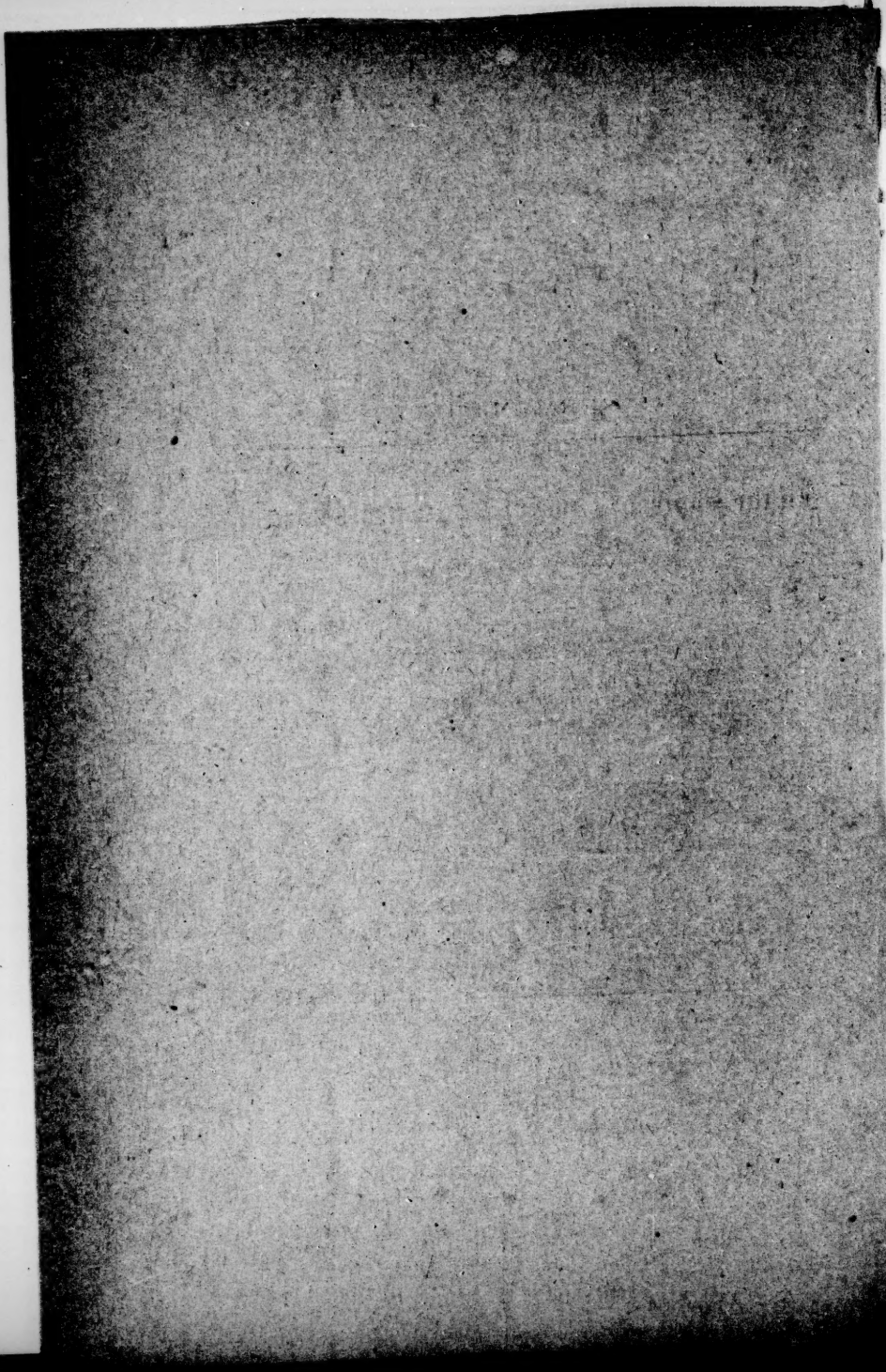
# In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ELIZABETH HEDDEN, ADMINISTRATRIX, etc., of Edward L. Hedden, collector of the port of New York, plaintiff in error,
*v.*
WILLIAM ROBERTSON.
No. 212.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## BRIEF FOR PLAINTIFF IN ERROR.



CASE NO. 14204.

# In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ELIZABETH HEDDEN, ADMINISTRATRIX, etc., of Edward L. Hedden, collector of the port of New York, plaintiff in error,
*v.*
WILLIAM ROBERTSON.
No. 212.

**IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.**

## BRIEF FOR PLAINTIFF IN ERROR.

This was an action to recover duties paid under protest. The importations were made in 1886, so that the case is governed by the tariff law of 1883. The action was tried before Judge Lacombe and a jury. A verdict was directed in favor of the importers, and the collector assigns error.

The importations were of figured cotton cloth of a class of fabrics known as "Madras curtain goods."

The collector levied duties under paragraphs 319–21 of the tariff law of 1883. These paragraphs are similar so far as concerns the present question. Paragraph 320 is as follows:

> On *all cotton cloth*, not bleached, dyed, colored, stained, painted, or printed, exceeding one hundred and not exceeding two hundred threads to the square inch, *counting the warp and filling*, three cents per square yard; if bleached, four cents per square yard; if dyed, colored, stained, painted, or printed, five cents per square yard:
>
> *Provided*, That on *all cotton cloth* not exceeding two hundred threads to the square inch, *counting the warp and filling*, not bleached, dyed, colored, stained, painted, or printed, valued at over eight cents per square yard; bleached, valued at over ten cents per square yard; dyed, colored, stained, painted, or printed, valued at over thirteen cents per square yard, there shall be levied, collected, and paid a duty of forty per centum ad valorem.

The importer's claim was that the goods were dutiable under paragraph 324, which is as follows:

> Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and *all manufactures of cotton, not specially enumerated or provided for in this act*, and corsets, of whatever material composed, thirty-five per centum ad valorem.

Plaintiff's only witness (besides the liquidator at the custom-house) was Nicol Paton Brown, of Glasgow, Scotland, the manufacturer of the goods.

The opinion of Judge Lacombe is reported at 40 Fed. Rep., 323, and is as follows:

> These samples are cotton cloth, within the dictionary definition and within the common, every-day meaning of the word "cloth," just the same as was the "penelope canvas" which was before us in *Ullmann* v. *Hedden* (38 Fed. Rep., 95). They are within the definition which was used as the test in that case, viz, "Cloth—a woven fabric, of fibrous material, used for garments or other purposes." Congress has, however, in the paragraph on which the defendant relies, prescribed rates of duty only for those kinds of cotton cloth which may be discriminated from each other by a count of the threads of which they are composed, such count being stated per square inch. That necessarily imports that the cloth shall be homogeneous, so that the number of threads per square inch will not differ in different parts of the fabric.
>
> The contention of the defendant that the threads in the so-called groundwork only are to be included in the count, the figures being regarded as a merely incidental ornament—as something added to the cloth—seems unsound in view of the testimony, which shows, without contradiction, that the figures (which in some of these samples cover fully more than half the surface of the goods) are woven upon the loom at the same time with the fabric itself. They are, therefore, just as much cotton cloth as the groundwork is, and the threads composing them as much entitled to a count. We then have a fabric which is indeed a cotton cloth, but which can not, as a whole, be fairly classified by the use of the test which Congress has provided as the sole one for classifying such cloth; and as it can not, therefore, be put in any one of the classes of cotton cloth on

which duty is laid as such, it must fall under the general clause. For these reasons I direct a verdict for the plaintiff for the full amount claimed, $983.93.

## STATEMENT OF FACTS.

These goods consisted of woven cotton cloth the groundwork of which was uniform, but which contained figures woven into the groundwork by means of a peculiar machine called a "Jacquard attachment." The weaving of the figure was contemporaneous with the weaving of the fabric, the Jacquard attachment working at the same time with the "shuttles * * * that carry the weft of the groundwork or main body of the fabric" (pp. 11–13). In addition, therefore, to the regular weft threads going from edge to edge, or selvage to selvage, of the fabric, there were other threads of different colors worked in by the attachment, all of which went in the transverse or weft direction, locking into the warp threads. There is, however, "no thread of the weft thread forming the figure that is continuous throughout the fabric" (p. 13). This is because the colored threads are clipped off by a clipping machine when the weaving process is completed.

The examiner at the custom-house, following his regular practice, took one square quarter of an inch of the fabric and with a glass counted the threads of the regular warp and filling, disregarding the threads of the figure, it being admitted that "in the groundwork of the fabric, as distinguished from the figure or pattern, the number of threads to the square inch is uniform throughout the fabric" (p. 11). The result multiplied by 4 gave the number of threads to the square inch. The question at issue

was whether this method of counting was correct or whether the goods were dutiable under the general clause as manufactures of cotton not otherwise provided for.

## ASSIGNMENT OF ERROR.

We assign for error the direction of a verdict in favor of plaintiffs (p. 13).

## ARGUMENT.

### I.

The language of the so-called "countable" clauses in the cotton schedule is not commercial in character. "There is no reference in the statute, either expressly or by implication, to any commercial usage, and there is no language which requires for its interpretation the aid of any extrinsic circumstances." (*Newman* v. *Arthur*, 109 U. S., 132, 138.)

The case above cited was decided under the Revised Statutes, but the language of the act of 1883 is not substantially different.

### II.

The statute, therefore, when it directs the examiner to count "the warp and filling," refers to the warp and filling ordinarily so called. The meaning of these words is well settled. They designate the two rows of threads which, woven into each other, constitute the cloth.

The Century Dictionary gives the following definitions:

> *Warp.*—6. The threads which are extended lengthwise in a loom, and across which the woof is thrown in the process of weaving.

*Filling.*—The woof or weft thread of a woven fabric.

*Woof.*—The thread that is carried by the shuttle and is woven into the warp by being passed back and forth through successive sheds or partings made in the warp or lengthwise threads by the action of heddles; the threads that run *from side to side* of a web; the weft.

*Weft.*—The threads, taken together, which run *across the web from side to side, or from selvage to selvage.* Also called woof.

*Selvage, Selvedge.*—2. That part of a web at either edge which is not finished like the surface of the cloth, and which is meant to be torn away when the material is made up, or for use in making the seam.

Webster gives the following definitions:

*Warp.*—1 (weaving). The threads which are extended lengthwise in the loom and crossed by the woof.

*Filling.*—2. The woof in woven fabrics.

*Woof.*—1. The threads that cross the warp in a woven fabric; the weft; the filling; the thread usually carried by the shuttle in weaving.

*Weft.*—1. The woof of cloth; the threads *that cross the warp from selvage to selvage;* the thread carried by the shuttle in weaving.

*Selvage.*—1. The edge of cloth which is woven in such a manner as to prevent raveling.

Knight's American Mechanical Dictionary gives the following definitions:

*Warp.*—2 (weaving). The threads running the long way of the fabric. * * *

*Filling.*—4 (weaving). The weft thread which fills up the warp. * * *

*Weft.*—The filling or woof of a web; *running from selvage to selvage.* * * *

*Selvage.*—3 (fabric). The edge or list of cloth, woven so as to prevent raveling.

The threads constituting the figures in this particular cloth, although in one sense they may be properly called weft or filling, because they all run in that direction, are not weft or filling within the definitions. They run in no case from edge to edge. This clause of the paragraph, "counting the warp and filling," seems to have been overlooked by Judge Lacombe. There is no difficulty whatever in applying the statutory provisions when the words of the statute are used in their ordinary meaning. Probably, indeed, the colored thread when the weaving process was complete ran across the fabric. They were then at once clipped off, however, so as to be confined to the figures. The "countable clauses" refer to the nature of the goods when inspected, not to their temporary condition at any stage of the process of manufacture.

Moreover, do the countable clauses require absolute uniformity of cloth? Must each quarter inch be like every other quarter inch? May not the examiner take a quarter foot, and average the inches? It is not necessary here, however, to decide these questions.

This question came up under the Revised Statutes in the Treasury Department, and it was decided by Assistant Secretary French July 19, 1877 (Syn. Dec., 3305), that the articles were assessable under the countable clauses. Similar rulings were made by the Treasury Department

under the act of 1883. (Syn. Dec., 6007, 6456, 8127.) The decision of Judge Lacombe in the case at bar caused a sudden revolution in a practice that had been well established for many years.

The decision of July 19, 1877, printed with the other reported decisions of the Treasury Department in 1878, and followed by a continuous and uniform practice of the Department with regard to this very common article of importation, can not possibly have been overlooked by the Tariff Commission of 1882, or by the Congressional committees or Congress itself in 1883. That the clause was reënacted in substantially the same form in 1883 should, therefore, be taken as a reënactment, not only of the former statutory language, but of its well-settled departmental construction. A very large number of instances was collected by counsel for defendant in error in his brief in the case of *Seeberger* v. *Hardy*, No. 93 of this term of court, showing that on revision of the tariff it is the custom of Congress to clarify its provisions in every case where doubt has arisen. The revisers examine not only the previous law, but every decision under it, judicial or departmental.

When any clause has received departmental construction unchallenged in the courts, and this construction has appeared in the form of a published decision and been followed for a period of five years, it is respectfully submitted that the same rules should be applied as are applied when a clause which has received judicial construction is adopted from a prior statute. (*Dollar Savings Bank* v. *United States*, 19 Wall., 227, 237; *The Anna*, L. R. 1, P. D.

253, 259; *McDonald* v. *Horey*, 110 U. S., 619, and cases cited; *Metropolitan R. R. Co.* v. *Moore*, 121 U. S., 558, 517; *Maddux* v. *United States*, 20 Court of Claims, 193, 198). Departmental construction is similar in effect to judicial construction except that it is of less weight. (*Schell* v. *Fauché*, 138 U. S., 562, 572, and cases cited.)

## III.

There is no indication that the word "filling" in the statute is customarily used in any but its usual sense of the thread running from edge to edge of the fabric, except by implication from the testimony of the Scotch manufacturer, Brown. Even he does not testify distinctly that the figure thread would be known in commercial language as "filling," nor is this believed to be in fact the case. In recent litigation where the point is raised the contrary has been proved. (*In re Haager*, 57 Fed. Rep., 192, 194.) No proof in other cases can, of course, affect the case at bar, unless courts may consider statements in reported cases in judicially noticing the true meaning of the English language; but in the absence of proof it is to be presumed that the commercial meaning is the same as the ordinary meaning. (*Swan* v. *Arthur*, 103 U. S., 597.) Witness, in explaining to the jury the method of weaving these fabrics, uses the words "loose threads of the weft," "threads of the filling," etc., in speaking of the figure on the cloth; but the mere selection of language by a witness in the endeavor to make clear to the jurymen his processes of manufacture can not be regarded as equivalent to proof of general commercial usage.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

C. G. Burgoyne's Printing Business, 146 [illegible]

# Supreme Court of the United States.

OCTOBER TERM, 1893.

ELIZ. HEDDEN, Admx.
vs.
WM. ROBERTSON.
No. 212.

## BRIEF FOR DEFENDANT IN ERROR.

### Statement.

This suit was brought upon affirmance by the Secretary of the Treasury upon an appeal to him taken by Mr. Robertson, of the action of the late Mr. Hedden as collector, in assessing, as cotton cloth having a certain number of threads in a square inch of warp and filling our "Madras mull," for curtains, etc. which had *not* a uniform number of threads throughout the fabric, but more upon those portions constituting the figures, wrought in during (and as part of) the process of weaving, by a Jacquard loom, than upon the plain surface. (Rec. 9 bottom to 12.)

The figures were in colors *(Id.* 11, fol. 24*)*; in all but one instance, of cotton thread. In that exceptional case, No. 15, the figuring weft was of silk. *(Id.* fol. 23.*)*

## POINTS.

### I.

The case of Newman v. Arthur has nothing in common with the cause at bar; unless it be the single immaterial circumstance that, in each, the importer claimed his goods not to be dutiable under the 'countable' clause of the Cotton Schedule.

Mr. Newman's claim was denied, at Circuit and in this Court.

With the Newman case, and your Opinion therein, before him the experienced Circuit Judge admitted the justness of Mr. Robertson's claim, and directed a verdict accordingly. The difference in the controlling circumstances of these two cases led to the different result. The *law* must be applied to the *facts*.

In the Newman case, it was sought to take cotton Italians out of the countable clause by the aid of "*extrinsic* circumstances." (109 U. S. 138; Atty. G.'s Br. 5.) Our Madras Curtains were never brought within this clause by the *intrinsic* facts.

The difference between the revision and the act of 1883 is only this;—that the Rev. Stats. applied the count to "all *manufactures* of cotton," etc., while the act of 1883 applies to "all *cotton cloth*," etc. (Atty. G.'s Br. 2.)

The acts of 1862 and of 1864 each contained the clauses which begin and end Rev. Sts. § 2504, Sched. A; the first being the count-clause, applied to "*all manufactures of cotton*," etc. and the concluding clause putting 35% on "*all manufactures of cotton*" n. o. p.

Evidently Congress in these successive enactments recognized the existence of otherwise unprovided for "manufactures of cotton," not properly coming within the "*all* manufactures of cotton" dutiable according to count under the first clause; because not susceptible of any fair square-inch count.

"All manufactures," notwithstanding the sweeping generality of the expression, did *not* mean all manufactures of cotton, not specially enumerated.

Consequently, the corresponding phrase of the act of 1883, which the Attorney-General justly remarks is "not *substantially* different" from the revision (His Br. 5), notwithstanding its generality, does not include everything which may be embraced within a comprehensive, dictionary definition of 'cloth.'

Though our goods should come within such definition, we do not believe that our Madras curtains would be thought of or spoken of by anybody as '*cloth* curtains.' If asked what they were, and any answer beyond the trade-name was given, it might be said they were 'cotton'—of that material; but nobody would find the idea of 'cloth' in the mind, or its expression upon the tongue; even though willing to admit that the dictionary-definition, when read, seemed to cover it.

People, generally, do not 'talk dictionary.' Nix vs. Hadden, 149 U. S., 304.

Manifestly, it is not *such* cloth as can be fairly dutied by a count of a-quarter of a square inch (Rec. 13) as representative of all the square yards there are in a piece.

## II.

Countable cottons are dutiable according to the percentum threads in a square inch;—in each, every, any, square inch of its surface; taken as representing all the inches and yards thereof;—ascertained by a count of "the warp and filling."

"Filling" just means that which fills; by or with which something is filled. Fred. Cozzens was told by his Nova-Scotian interlocutor that oat-meal did not constitute so large a portion of his diet because con-

sidered especially wholesome, or particularly palatable, but " it is aye *filling*." !

Accept, if you please, the definitions of my friend's brief (Pp. 5 to 7.) that the warp-thread extends the length of the piece, and the weft or " filling " across it, from selvage to selvage ;—*that* does not justify the assessment and exaction of which we complain! Counsel says (Br. 5, II) " The meaning of these words is well settled. They designate the two rows of threads which, woven into each other, constitute *the* cloth."

Well ! when we present to the collector an article in which these " two rows of threads " do *not*, actually, commercially, nor as the elements of manufacture or value, " constitute the cloth," then we show him something which, according to his counsel's definitions, he had no right to duty as he did ;—since it does not come within those definitions.

Here lies the difference between this and the Newman case.

Mr. Newman imported 'cotton Italians,' having the warp-thread from end to end and the weft-thread from side to side, by careful weaving and calendering given a smooth and glossy surface. (109 U. S. 133.)

Such figures as it had were merely made by 'twilling' these two threads ; *i. e.* by passing the weft-thread over one and then under a number (from two to ten) of the warp-threads. (Imp. and Cent. Dicts.)

In Mr. Newman's case, the difficulty of counting arose from the goods being woven white and colored in the piece, whereby the dye-stuff obscured and covered the fine threads, so they had to be unravelled to be counted ; otherwise, they could easily have been counted upon the reverse, if not upon the face.

The crucial test, however, is this ;—the threads in Mr. Newman's goods *could* be accurately counted—and *were ;* in ours, they could *not* be, and were *not*.

Counsel's whole argument is, not that our goods were dutied according to the threads they actually

contained, but that there were certain threads *not* counted because (he says) not within the dictionary definition of 'filling.'

Call it what you please, it was just as much *a part of the thing* made, introduced in the very act of making, as were those threads which ran from end to end and from side to side, which these did, too, in the weaving, being clipped off later in the manufacture; and these figure-threads really gave the article all its value, by adapting it to the use for which it was made and imported. Any argument which shuts the eye to this important element of the manufacture and of the value must be unsound and untenable.

Of course, we do not claim these figure-threads ought to have been counted. It will be seen *neither side so contends*. To do so would have been so unfair, and given the fabric such an untrue numeration of threads per square inch, that the collector no more thought of doing it than anybody now thinks of suggesting it ought to have been done.

The law intends nothing as to any particular inches, or quarter-inches, feet or quarter-feet; and knows nothing of *averages*. (Atty. G's. Br. 7.)

The lawful inquiry is, how many threads are there to a square inch of this stuff—any square inch? How many threads *per* square inch? An answer that in some inches (or *quarter*-inches) there are one or two hundred threads, and in others three or four hundred, so it will *probably average* (say) three hundred, is a confession that this commodity is not dutiable under this clause. The examiner is to actually count threads; not, to estimate conjectural 'averages' from an inspection of various figures upon the web.

The whole argument of the government makes more palpable the fact that the threads in our importations could not be counted. The legal result is, they do not fall under the countable clause, but under that pro-

viding for manufactures of cotton *not* otherwise provided for.

Goods the threads of which cannot be subjected to a *true, fair* and *just* count do not come under this counting clause.

On unbleached cotton cloth the duty varies, according to the count of threads, from two and one-half to four cents *per square yard;* not $2\frac{1}{2}$ cents upon one yard and four cents on the next because the figure-threads have increased the threads in the latter. The statute lays down a rule applicable only to a uniform number of threads--in the warp and filling.

## III.

The right to maintain the action rests upon an appeal made to the Secretary of the Treasury, and his affirmance of the Collector's decision (Rec. 9, fol. 21); yet we are met here by the proposition, which confronts us in every tariff case, that we must be turned out of Court because the Treasury Department has ruled against our claim; whereas, without his *adverse* decision we could never come into Court at all. His *ipse dixit* amounts to nothing, except as a condition precedent to a suit; which is a reason why it is not always very carefully considered. I once heard ex-Judge Howard argue to a jury that a testator must be found competent, since he had, under his own hand and seal, declared; "I, John Smith, being of sound mind," etc.

Taxes are not imposed by the determination of the tax-collector, but by positive statute; otherwise, the simplest form of tariff would be;—"There shall be imposed upon all imports such duties as the Secretary of the Treasury may from time to time prescribe."

Of a departmental effort to introduce a test that

would ensure a higher tax than did that prescribed by law, the Court said ; Congress alone has the authority to levy duties. Its will alone is to be sought. . . . Discretion in the custom-house officer should be limited as strictly as possible. It has been said, with much truth, "Where law ends, tyranny begins."

Merritt v. Welsh, 104 U. S. 700, 702.

Where a question arises as to the propriety of methods of procedure in the administration of a department, the long continuance of the practice may be considered ; not on the question whether or not the statute imposes the tax paid under protest. That inquiry is, in the highest degree, judicial in its character.

If the fact that the Secretary has decided the pending question against us is of no effect, except to enable us to sustain our suit, it is naturally immaterial that he has decided against John Smith, Tom Brown, and forty others, on the same point ; otherwise only the first protestants could profit by the law allowing protests.

That in a town of a thousand tax-payers, 999 had quietly paid their taxes would have no effect upon the case of one litigant contesting its validity.

Said the steward of a Mississippi steamer ;—" More than two hundred men have wiped on that towel, and you are the first man that has grumbled." The passenger, nevertheless, had a right to complain.

Departmental constructions make queer readings of the law.

No Special Agent ever advanced a theory too preposterous to find endorsement in a departmental circular.

For instance, declaring that twelve kegs of Dutch herrings should make a barrel ; while in fact, by actual measurement, sixteen were just equal to a barrel. But no more absurd construction was ever promulgated, though supported by an Attorney-General's Opinion